



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-149

June 6, 2016

The Honorable Jimmy Hickey, Jr.
State Senator
1600 Arkansas Blvd., Suite 106
Texarkana, AR 71854

Dear Senator Hickey:

This is my opinion on your questions about the consequences of a county's loss of checks submitted to it in payment of property taxes.

You indicate in your request that taxpayers were given receipts but their checks were never presented to banks for payment and cannot now be located. The checks' loss presumably was due to the fault of the county's former collector/treasurer, who has been convicted of theft in connection with her official duties. After some taxpayers discovered their checks had not been presented for payment, "the county ensured the taxpayers who had receipts that they were absolved from any immediate liability as a result of the missing checks." After investigation, the county gave notice to the taxpayers and attempted to collect the unpaid taxes. The county has collected about half the unpaid total.

Your questions are:

1. Even though the taxpayer issued a check to pay their taxes, does the taxpayer remain liable for the tax debt?
2. If the answer to question 1 is "yes," should these tax liabilities be considered as delinquent and be listed on the delinquent taxpayer list?

RESPONSE

In my opinion, the answer to each of your questions is “yes,” but the county must treat the taxpayers fairly and equitably in collecting the remaining unpaid taxes.

DISCUSSION

Question 1 – Even though the taxpayer issued a check to pay their taxes, does the taxpayer remain liable for the tax debt?

The Arkansas Constitution states that “[t]he taxes of counties ... shall only be payable in lawful currency of the United States....”¹ An Arkansas statute is substantially similar.²

While no Arkansas cases discuss the meaning of these provisions, a similar statute applying to state taxes may supply more guidance: “All remittances required to be paid under any state tax law shall be made ... by bank draft, check, cashier’s check, money order, or money.... *No remittance, other than cash, is a final discharge of liability due ... until it has been paid in cash.*”³

In my view, the applicable provisions mean that, while a county might accept a check in payment of taxes, the tax liability is not satisfied until the county actually receives cash in payment of the check. A legal encyclopedia expands on the rule:

The acceptance of a check on a bank for the amount of the drawer’s taxes is at most only a conditional payment; that is, the taxes are not paid until the check is paid, and *if it is never presented or is dishonored, the taxes remain a charge, even though a receipt in full for the taxes has been issued, the receiving officer treats the check as cash, or as payment, or is negligent in handling it.*⁴

¹ Ark. Const. art. 16, § 10. The constitution also permits payment in “orders or warrants of said counties,” but this provision is not relevant to your questions.

² “The county taxes of any county of this state levied in pursuance of law shall only be payable in the lawful currency of the United States or scrip or warrants of the county by whose authority they were issued....” Ark. Code Ann. § 26-35-502 (Repl. 2012).

³ Ark. Code Ann. § 26-18-503(b) (Repl. 2012) (emphasis added).

⁴ 85 C.J.S. *Taxation* § 1033 (2016) (citations omitted; emphases added); *see also* Annotation, *Payment of Tax by Check or Draft; and Question of Subrogation in that Connection*, 124 A.L.R. 1155 (originally

In my opinion, then, a taxpayer whose check was lost by the county and never presented for payment remains liable for the tax.

Question 2 – If the answer to question 1 is “yes,” should these tax liabilities be considered as delinquent and be listed on the delinquent taxpayer list?

The law states that “[a]ll taxes unpaid after October 15 are delinquent,”⁵ and requires preparation of a “list of the delinquent lands”⁶ and a “list of delinquent personal property taxes....”⁷ No exceptions are stated. It is accordingly my opinion that tax liabilities not satisfied by October 15 are delinquent and must appear on the appropriate list of delinquencies.

However, it is of the utmost importance to remember that the taxpayers at issue did everything required of them by law to pay their taxes on time and were not at fault in connection with the checks’ loss. The Arkansas Property Taxpayer Bill of Rights requires that taxpayers “receive *fair ... treatment* throughout the property tax system.”⁸ Fairness depends on the facts and circumstances prevailing in each case, which may differ among taxpayers, particularly with respect to actions taken or omitted after the checks’ loss was discovered.

I cannot advise the county in general with respect to its actions to collect the unpaid taxes and delinquency penalties. But I will say that, absent facts not stated in your request, it would likely be unfair to attempt to collect the statutory delinquency penalty⁹ from these taxpayers.¹⁰ It would also likely be unfair for the county not to protect a taxpayer from overdraft fees and the like, in the event the

published 1940, updated weekly), *supplementing* Annotation, *Payment of Tax by Check or Draft*, 44 A.L.R. 1234 (originally published 1926, updated weekly).

⁵ Ark. Code Ann. § 26-36-201(a)(2) (Repl. 2012).

⁶ Ark. Code Ann. § 26-37-106(a)(1) (Repl. 2012).

⁷ Ark. Code Ann. § 26-36-203(a)(1)(A) (Repl. 2012).

⁸ Ark. Code Ann. § 26-32-202(a)(4) (Repl. 2012) (emphasis added).

⁹ See Ark. Code Ann. §§ 26-35-501(c)(1) (Repl. 2012), 26-36-201(b)(1), 26-36-202(b).

¹⁰ Cf. Ark. Code Ann. § 26-18-705 (Repl. 2012) (regarding authority of Director of Department of Finance and Administration to settle and compromise controversies relating to state taxes).

taxpayer submits a replacement check which is paid, and the original check is found and accidentally or otherwise also presented for payment. And it would likely be unfair to place any name on a published delinquency list until the last day possible under the law and without repeated serious efforts to obtain payment from the taxpayer.

Finally, as a general matter, a government is not estopped from taking a course of action – like collecting a penalty otherwise due from a taxpayer – unless, among other things, an agent of the government has made an “affirmative misrepresentation” on which the other party relied.¹¹ While I have no reason to believe any affirmative misrepresentation was made here,¹² I am not necessarily in possession of all material facts and thus cannot conclusively say. Nor can I speculate productively about equitable remedies a court might apply in order to ensure that a taxpayer is treated fairly and equitably in these circumstances. I can merely reiterate that the county should treat each taxpayer fairly and equitably given the circumstances of his or her case.

Sincerely,



LESLIE RUTLEDGE
Attorney General

¹¹ See, e.g., *Arkansas Dep't of Human Services v. Estate of Lewis*, 325 Ark. 20, 922 S.W.2d 712 (1996).

¹² Your request indicates that the county told taxpayers they were “absolved from any *immediate* liability” with respect to the lost checks.